MATSUSHITA GREATWALL CORPORATION PTE LTD.

v.

KKBI MANUFACTURING SDN. BHD. & ANOTHER CASE

HIGH COURT MALAYA, KUALA LUMPUR
DATO' KAMALANATHAN RATNAM JC
[COMPANIES WINDING-UP NO. D5-28-400-93]
16 NOVEMBER 1995

TORT: *Tort of conspiracy - Abuse of legal process - Malicious prosecution and trespass - Application for leave to commence proceedings against provisional liquidator - Whether liquidator has acted reasonably - Whether liquidator's action tantamount to abuse of legal process and conspiracy.*

CIVIL PROCEDURE: *Leave - Whether leave of Court is needed before an action can be begun against a liquidator.*

CIVIL PROCEDURE: *Action in tort - Mode of commencement - Application for leave to commence proceedings against provisional liquidator under s. 143 and 218 of the Companies Act 1965 - Whether proper - Draft statement of claim shows reliance on common law and not Companies Act.*

CIVIL PROCEDURE: *Intitulement - Claim founded in tort - Proper intitulement - Leave to issue a writ under common law for damages - Whether to be by way of originating summons - Rules of the High Court 1980 O. 5 r. 2(a) - Companies Act 1965 ss. 231, 233, 263(3).*

COMPANY LAW: *Unofficial liquidators - Control of - Whether complaint by third party against liquidator should be directed to Official Receiver first - Companies Act 1965 s. 229(1) - Companies (winding up) Rules 1972 r. 277(2).*

Matsushita Greatwall Corporation Pte Ltd. filed a petition to wind up a company called KKBI Manufacturing Sdn Bhd (formally known as Kingkoil Bedding Industries Sdn. Bhd.) (respondent company) under s. 218 and/or s. 143 of the Company Act 1965 (the Act). Prior to the winding up order being made, by an *ex parte* application, the petitioners sought to appoint one Ng Pyak Yeow as the provisional liquidator (liquidator) of the respondent company and obtained an order to the effect from the High Court on 6 April 1995. After obtaining the said order the provisional liquidator promptly filed an *ex parte* summons chambers on 10 April 1995 praying for various orders, *inter alia*, to empower the bailiff of Telok Datok Magistrate's Court, Banting, to take possession and control of No. 1 Lorong 10B, Telok Panglima Garang, Banting 42500 Kuala Langat (the property) and deliver the same to him. To support the aforesaid application the provisional liquidator affirmed an affidavit

that on 7 April 1995 he proceeded to respondent's place of business at Damansara Jaya, which said address he obtained form the annual returns of the respondent company filed with the Registrar of Companies, and met one Mr. Mark, who apparently told him that the respondent's documents, books and other effects of businesses were to be found at Lot 7, Lorong 10B, Telok Panglima Garang, Banting 42500 Kuala Langat. Thereupon he proceeded to the said address and met one Mr. Cheong Tack Pook who identified himself as a director of the respondent company. The provisional liquidator, then exhibited the sealed copy of the Court order after identifying himself and asked the director and his staff to vacate the premises and surrender to him the keys to the property. The director refused to obey this order. The provisional liquidator then went to the local police station and sought the assistance of one Sergeant Esa, the OCS of the said police station. This time too the director refused to vacate. This prompted the provisional liquidator to lodge a police report. He also attempted to obtain a warrant of arrest at the district Magistrate Court on 8 April 1995 against the respondent director but failed. Hence the aforesaid application.

The respondent company then on 12 April 1995 filed a summon-in-chambers to set aside the aforesaid *ex parte* order dated 10 April 1995 which was heard with the provisional liquidator personally appearing before Abdul Malek J and consenting that the order dated 10 April 1995 be set aside. Upon setting aside the aforesaid order, the four applicants in this case, all of whom occupying the same premises at Lot 1, Lorong 10B, Telok Panglima Garang, Banting Selangor, filed an application for leave to commence proceeding against the provisional liquidator for the tort of conspiracy, abuse of legal process, malicious prosecution, trespass and for consequential damages. One Tay Yew Keng, the chairman of the first applicant affirmed an affidavit on behalf of the applicants wherein he contended that arising out of the wrongful conduct of the provisional liquidator the applicants had suffered losses as set out in the draft statement of claim exhibited thereto. He alleged that the proposed defendants attempted to paralyse the operation of the proposed plaintiff's business and also accused them for the collusion, bad faith and malicious intent with ulterior notice to damage the proposed plaintiff's business. In reply the provisional liquidator averred that the order required him to take possession control and protect the assets of the respondent company. And based on the searches made in respect of the applicants he contended that the applicants are all related companies and share some of the directors and shareholders. He further contended that if the applicants had any *bona fide* complaints against him they should first take their complaint to the Official Receiver as per s. 229(1) of the Act. He also relied on r. 63 of the Companies (Winding up) Rules 1972 conferring him the status of an officer of the Court and pursuant to s. 14 of the Courts of Judicature Act 1964 he further claimed judicial protection. Before the learned Judical Commisioner the primary issues that sprang up were:

1. Whether the provisional liquidator had acted outside his authority and as such his conduct was reproachable and tantamounts to abuse of process of Court.

2. Whether applicants must obtain leave from the Court before issuance of writ against the provisional liquidator.

3. Whether the applicants should have first taken their complaint to the Official Receiver in accordance with s. 229(1) of the Act and s. 277(2) of the Rules.

4. What should be the correct mode of instituting the present cause of action i.e. the intitulement.

Held:

[1] The provisional liquidator was appointed under s. 231 of the Act, before the winding up order was made, for the specific purpose of ensuring that there would be no dissipation of the assets. Section 233(1) of the Act provides that the provisional liquidator shall take into his custody or under his control all the properties and things in action to which the company is or appears to be entitled. There was no lack of authority in the appointment of the provisional liquidator in this case and that he had powers to act pursuant to s. 233(1) of the said Act.

[2] In order to succeed the tort of abuse of the process of the Court must be an act or a threat that accompanied the legal process and which act or threat was committed for the purpose of furthering the misuse. Every advantage that a litigant intends to take against his opponent after launching an action cannot be labelled as an abuse of process merely because the Court has no authority or power or jurisdiction to grant the order sought. It takes on the mantle of sinisterness when the ulterior motive is to take a distinctive advantage over one's opponent upon a matter unrelated to the legal process commenced. The applicants have not satisfied on the evidence disclosed in the affidavits that the facts narrated bear out the case for abuse of process against the provisional liquidator. There would be no abuse involved if a plaintiff genuinely seeks to achieve what he is entitled to by way of a suit and thus filed the suit for the purpose of achieving that objective.

[3] The mischief complained of by the applicants was done whilst the provisional liquidator was in office. Since it has been established that in such circumstances he was an officer of the Court, leave must, therefore, be obtained before an action can be commenced against him.

[4] It is plain that pursuant to r. 277(2) the parties who can complain against the liquidator are the creditor, contributory or the Official Receiver. Since the applicants are third parties affected by the conduct of provisional

liquidator they do not fall within the ambit of s. 229(1) of the Act or r. 277(2) of the Rules.

[5] The applicants having taken out a summons in chambers under the same case number dealing with the Companies (Winding-Up) action and specifically raising in the intitulement that they would rely upon the provisions of the sections of the Act are bound by their own course of action. Rightfully, the applicant should have applied by way of originating summons since their claim is founded in tort. It is wrong for them to seek leave under the suit already filed which relates to company matters. The application for leave in respect of issuing a writ under common law for damages ought to have been by way of originating summons.

Per Curiam:

1. Where a legal process, the basis for which in itself could have proper foundation, has been perverted to satisfy some other motive such as extortion or oppression, an action will lie at the feet of a party that suffers the wrong. This is the tort of abuse of process. Unlike the tort of malicious prosecution the tort of abuse of process does not depend on the wrongful procurement of the legal process but in the misuse of the process however correctly it was obtained.

2. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegations he be given leave to bring an action against a liquidator, then the wheels of justice which at the moment grind extremely slowly, will in such circumstances come to a halt. No one will venture towards this task. A liquidator will spend all this time defending every action filed against him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Costs will escalate and his fees will have to be fixed.

[Application for leave dismissed]

Cases referred to:

Ng Hee Thoong & Anor. v. Public Bank Bhd. [1995] 1 CLJ 609; [1995] 1 MLJ 281 ***(foll)***

Chock Kek Ling v. Patt Hup Transport Co. Ltd. & Ors [1966] 1 MLJ 120 ***(refd)***

QIW Retailers Ltd. v. Felview Pty Ltd. & Anor. [1989] 7 ACLC 510 ***(foll)***

Speed Seal Products Ltd. v. Paddington [1986] 1 All ER 91 ***(cit)***

Grainger v. Hill [1838] 4 Bing NC 212, 132 ER 769 ***(foll)***

Goldsmith v. Sperrings Ltd. [1977] 2 All ER 566 ***(refd)***

Varaira v. Howard Smith [1911] 13 CLR 3 ***(foll)***

Metall und Rohstoff AG v. Donaldson Lufkin & Jenrette Inc & Another [1988] 3 WLR 548 ***(refd)***

Re Timberland Ltd. (in liq), and Equitable Forestry Services Pty Ltd. (in liq) 4 ACLR 259 ***(refd)***

James Smith & Sons (Norwood) Limited v. Goodman [1936] 1 Ch 216 ***(refd)***
Lonrho Plc v. Fayed and Ors. [1991] 3 All ER 303 ***(refd)***
Lim Hean Pin v. Thian Seng Co. Sdn. Bhd. & Ors. [1992] 2 CLJ 828; [1992] 2 MLJ 10 ***(foll)***
Winch v. Jones & Anor. [1985] 3 All ER 97 ***(cit)***
Zainal Abidin Putih & Anor. v. Che Wan Development Sdn. Bhd. [1992] 3 CLJ 1539; [1992] 2 MLJ 233 ***(foll)***
Furber v. Kratter, The Times 21 July 1988 ***(not foll)***
Chi Liung Holdings Sdn. Bhd. v. Ng Pyak Yeow [1995] 3 AMR 45: 2630; [1995] 3 MLJ 204 ***(foll)***
Omarjee v. Lincoln Hunt Australia Pty Ltd. [1986] 4 ACLR 205 ***(cit)***
Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari b. Abdul Rahman [1995] 1 AMR 759 ***(foll)***
Chi Liung & Son Sdn. Bhd. v. Chong Fah & Sons Sdn. Bhd. & Anor. [1974] 2 MLJ 211 ***(refd)***

Legislation referred to:
Companies Act 1961 (Aus), s. 278
Companies Act 1965, ss. 143, 218, 229, 231(1), 232(2), 233, 236(3)
Courts of Judicature Act 1964, s. 14
Companies (Winding-up) Rules 1972, r. 63, 65(1)(2), 66, 277(2)
Rules of the High Court 1980, O. 5 r. 2(a)

Other sources referred to:
Halsbury's Laws of England 4th Edn., Vol. 17, para 457

For the applicants - Murthi, M/s. Murthi & Partners
For the respondent - CK Tan, M/s. CK Tan & Co.

JUDGMENT

Kamalanathan Ratnam JC:

This is an application for leave to commence proceedings against the provisional liquidator for the tort of conspiracy, abuse of legal process, malicious prosecution and trespass and for consequential damages.

Facts leading to the filing of this application

TN Metal Industries Sdn. Bhd. is the registered owner of premises Lot 1, Lorong 10B, Telok Panglima Garang, Banting, Selangor (hereinafter referred to as the "Telok Panglima address"). Dreambed (Malaysia) Sdn. Bhd. and KKBI System (M) Sdn. Bhd. are two tenants of the said owner and have their place of business at the said Telok Panglima address. A fourth company called King Koil Inc Sdn. Bhd. has at the same premises its leased and hire purchase machinery. All four companies are the applicants herein.

Matsushita Greatwall Corporation Pte Ltd. filed a petition to wind up a company called KKBI Manufacturing Sdn. Bhd. (formerly known as King Koil Bedding Industries (M) Sdn. Bhd. and hereinafter called the "respondent

company") under s. 218 and/or 143 of the Companies Act 1965 (hereinafter referred to as "the Act").

In the meantime, prior to the winding up order being made, the petitioners filed an *ex parte* application to appoint one Ng Pyak Yeow as the provisional liquidator (hereinafter referred to as the "liquidator") of KKBI Manufacturing Sdn. Bhd., without security and obtained an order before Dato' Haji Abdul Malek J on 6 April 1995 (hereinafter referred to as the "*ex parte* order").

No sooner had he been appointed, the provisional liquidator promptly filed an *ex parte* summons in chambers praying for various orders amongst which were:

1. That the Bailiff of Telok Datok Magistrate's Court, Banting, Kuala Langat do hereby, in execution of the order of Court made on the 6 April 1995, take possession and control of No. 1, Lorong 10B, Telok Panglima Garang, Banting 42500 Kuala Langat ("the property").

2. That the Bailiff immediately upon taking possession of the property deliver possession and control of the same to the Provisional Liquidator, Mr. Ng Pyak Yeow.

In support of the above application the provisional liquidator affirmed that on 7 April 1995, he proceeded to the place of business of the respondent company at No. 64, Jalan SS 22/25, Damansara Jaya, 47400 Petaling Jaya (hereinafter referred as to as "Damansara address"), which said address he obtained from the annual returns of the respondent company made on 8 June 1993, and filed with the Registrar of Companies. He then proceeded to the said place of business on 7 April 1995 and was there informed by one Mr. Mark that the respondent company's documents, books and other effects of business were to be found at Lot 7, Lorong 10B, Telok Panglima Garang, Banting 42500 Kuala Langat i.e. the first applicant's said premises referred to in prayer 2 above and hereinafter referred to as the Telok Panglima address.

He then proceeded to the Telok Panglima address and met one Mr. Cheong Tack Pook who identified himself as a director of the respondent company. He then showed the sealed copy of the order of Court appointing him the provisional liquidator and requested Mr. Cheong Tack Pook and staff to vacate the premises and to hand him the keys to the property. This was flatly refused by Mr. Cheong Tack Pook.

The provisional liquidator then went to the local police station and sought the assistance of one Sergeant Esa, the officer in charge of the said police station.

Again Mr. Cheong Tack Pook refused to vacate. On advice by Sergeant Esa, he lodged a police report of this and on further advice by the police he tried to obtain a warrant of arrest at the Telok Datok Magistrate's Court on 8 April 1995 against Mr. Cheong Tack Pook. As the learned Magistrate refused to issue a warrant of arrest without the approval of this Court he then made the

abovesaid application and obtained the orders prayed for as stated earlier, before Dato' Abdul Malek J on 10 April 1995.

The respondent company then on 12 April 1995 filed summons-in-chambers to set aside the *ex parte* order dated 10 April 1995 which was heard on 17 April 1995 with the provisional liquidator himself personally appearing before Dato' Haji Abdul Malek J and consenting that the order dated 10 April 1995 be set aside.

Having set aside the order dated 10 April 1995 the four applicants now seek leave to commence proceedings in tort against the provisional liquidator.

Facts averred by the applicants in support of their application

One Tay Yew Keng affirmed an affidavit on behalf of all the applicants (hereinafter referred to as "Tay's affidavit") wherein he contended that arising out of the wrongful conduct of the provisional liquidator the applicants had suffered losses as set out in the draft statement of claim, exhibited thereto.

The draft statement of claim

In the said draft statement of claim the four applicants who are the proposed plaintiffs intend to sue the proposed defendants, namely Liong Thiam Keong, Matsushita Greatwall Corporation Pte. Ltd. and Ng Pyak Yeow, the provisional liquidator. I gathered from a study of all related affidavits that the proposed first defendant who affirmed the affidavit in support of the application to appoint the provisional liquidator is the managing director of the proposed second defendant.

It was alleged in the proposed statement of claim that the proposed second defendant, at the instigation of the proposed first defendant, applied *ex parte* to appoint the proposed third defendant as provisional liquidator. I was further alleged in para 13 that:

> the defendants unlawfully unconspired to injure the plaintiff by abuse of the legal process, malicious enforcement of order (dated 6 April 1995) and trespass)

and gave various particulars. I take note that the word "unconspired" ought to mean "conspired". There was a futher allegation that the proposed defendants wanted to paralyse the operation of the proposed plaintiffs' business. There were allegations of collusion, bad faith and malicious intent with ulterior motive to damage the proposed plaintiffs' business. There was also claim for special damages suffered by each of the four proposed plaintiffs.

In reply to Tay's affidavit, the provisional liquidator affirmed an affidavit in which he stated that he had been a public accountant of 19 years' standing and had 29 years of varied and diverse knowledge and expertise in accountacy, taxation, management and other related fields. He had been a liquidator for many voluntary winding-up proceedings as well as the Court appointed liquidator

on compulsory winding up proceedings. He had many professional qualifications and had published many papers and conducted many seminars and workshop sessions and within the last 8 years had been appointed liquidator to at least 160 companies which had been ordered to be wound up by the High Court of Malaya. His appointment on 6 April 1995, required him to take possession, control and protect the assets of the respondent company as well as to employ and/or terminate the employment of the respondent company's employees. He also averred that the petitioner had given an undertaking to abide by any order made by this Court in respect of damages held to be sustained by the respondent company by reason of his appointment as the provisional liquidator. Based on the searches made in respect of the applicants he averred that the applicants are all related companies and share some of the same directors and shareholders.

He questioned the propriety of the affidavit of Tay Yew Keng who is the managing director of the first applicant affirming the affidavit in support of this application on behalf of all the other three "individual legal entities" and averred that the first applicant, which was a 100% owned subsidy of the fourth applicant, was not even in operation at the material time. He then set out chronologically the day by day events during his tenure of office as a provisional liquidator from date of appointment to the date he consented to the order dated 10 April 1995 to set aside his appointment.

It must be noted that his appointment was as a provisional liquidator and since by consent the company was wound on 12 April 1995 and as the Official Receiver was appointed provisional liquidator, his tenure of office clearly became redundant.

It is noteworthy that the provisional liquidator had specifically pleaded that after proceeding to the office of the respondent company at the Damansara address and on being told Mr. Mark of the Telok Panglima address, one of the solicitors of the petitioners who accompanied him, called the petitioners in Singapore, who confirmed and gave him the exact address which was the Telok Panglima address. He also affirmed that there was a company sign of the respondent company on the wall of the premises. He would terminate the services of the employees temporarily if necessary to prevent sabotage or dissipation of assets or removal of documents.

He further averred that on 10 April 1995 having obtained the *ex parte* order to take possession of the respondent company's factory he proceeded to the Telok Panglima address where was he was met by the same Mr. Mark and one Mr. Yeoh Chin Wah together with Major Murthi, the applicants' Counsel herein, and upon the said Counsel giving his solicitor's undertaking that the assets of the company would not be concealed or removed pending the hearing of the application to set aside the order appointing him provisional liquidator,

he agreed not to take possession. In fact he specifically averred that on both dates he had never proceeded beyond the reception area of the property.

One other matter averred by the provisional liquidator was in relation to a draft letter of termination of employees. He telephoned his office to fax a draft letter of termination to the respondent company at the Telok Panglima address for his use. Whilst his office fax record showed that the draft letter had indeed been faxed to him at the respondent company's office, the respondent company's staff denied that the said letter had gone through their fax machine.

He further contended that if the applicants had any *bona fide* complaints against him they should first take their complaint to the Official Receiver as is provided for under s. 229(1) of the Act.

He also relied on r. 63 of the Companies (Winding-up) Rules 1972 (hereinafter referred to as "the said Rules") conferring him the status of an officer of the Court and by reference to s. 14 of the Courts of Judicature Act 1964 he futher claimed judicial protection in lawful discharge of his duties.

Subsequently, the managing director of the petitioners filed another affidavit in which he affirmed that the respondent company operated a factory at the Telok Panglima address and his knowledge of this was based on information provided to him by various suppliers who supplied raw materials to the respondent company for the latter's manufacturing process. He knew these suppliers because even the petitioners purchased from the same suppliers.

In response to the above the Finance Manager of the first applicant affirmed an affidavit in reply in which he stated that the undertaking as to damages provided by the petitioners applied to the respondent company and not to third parties such as the present four applicants. Whilst admitting that there were common directors of the companies involved, he denied that the said companies were interrelated. Mr. Mak denied informing the provisional liquidator that the books of accounts were at the Telok Panglima address. According to Mr. Mak the provisional liquidator merely asked him the whereabouts of KKBI and he took this to mean the third applicant herein. Cheong Tack Pook *vide* his affidavit said that the provisional liquidator wanted to sack the employees and thus handed him a letter addressed to the Telok Panglima address but did not identify the company to which the purported termination applied.

Fong Heng Leong denied that there was any sign of the respondent company on the wall of the Telok Panglima address.

Case for the Applicant

Mr. Murthi for the applicants summed up the case against the provisional liquidator based on their affidavits into 3 heads:

(1) Challenge to the facts

(2) Section 14 of the Courts of Judicature Act 1964 is pleaded to claim immunity.

(3) Section 229 of the Act has been pleaded as a defence.

(1) *Challenge as to Facts*

The Court was taken through the facts. I have related in *extensio* the relevant facts material to this application. The provisional liquidator has averred that the applicants and the respondent company are all related companies and shared some of the same directors and shareholders. I have to consider this in the light of the affidavit sworn by Tay Yew Keng, the Chairman of the first applicant and who has been duly authorised to affirm the affidavit on behalf of the rest of the applicants. When this issue was raised by the provisional liquidator the applicants countered with a terse response that since the other three applicants did not mind, what business did the provisional liquidator have to speak for the three companies. I am of the view that the very fact that the three other independent legal entities have entrusted their case into the hands of the Chairman of the first applicant lends weight to the provisional liquidator's suggestion that the applicants and the respondent company share the same directors and shareholders. In fact in para 18 of Enclosure 42 the provisional liquidator specifically alleged that relationships between the applicants and the respondent company are so closely intertwined and interrelated. In his reply Fong Heng Leong at para 15 of Enclosure 45 merely denied "that the respondent companies (should be "applicant companies") are closely intertwined and interrelated". There was no specific denial of the inter relationship between the applicants and the respondent company as alleged by the provisional liquidator herein.

I remind myself of the averment of the law in this respect as expressed by Gopal Sri Ram JCA, in *Ng Hee Thoong & Anor. v. Public Bank Bhd.* [1995] 1 MLJ 281, 286 CA and with which I totally associate myself. His Lordship said:

> Now it is a well settled principle governing the evaluation of affidavit evidence that where one party makes a positive assertion upon a material issue, the failure of his opponent to contradict it is usually treated as an admission by him of the fact so asserted.

I now consider the allegations of collusion, bad faith, conspiracy and malicious intent levelled against the provisional liquidator. It was contended that if Mr. Mak had told the provisional liquidator of the Telok Panglima address surely the provisional liquidator would have mentioned this fact in his police report. In *Chock Kek Ling v. Patt Hup Transport Co. Ltd. & Ors.* [1966] 1 MLJ 120, 121, Azlan Shah J (as His Highness then was) said:

> The report does not and will not contain everything under the sun. It is merely the first step to bring the police machinery into effect.

There is no requirement that the maker of a report has to state every allegation in his police report. Once a report stating basic facts necessary to commence an investigation is made then a statement is recorded and details are given in that statement. Further, surely in making such a suggestion, the applicants failed to appreciate that one is always wiser after the event. It was also suggested that the provisional liquidator took directions from the petitioners. Of course he had to, and he had to be accompanied and rightly so, by the solicitors for the petitioners. This cannot amount to collusion or conspiracy. As opposed to such bare allegations, is the untarnished record of the provisional liquidator whose credentials and work had been laid bare and no impropriety or abuse of power or process has been shown in respect of any of the 160 companies he had so far wound up by order of the High Court of Malaya.

The provisional liquidator has affirmed that when he went to the Damansara address of the respondent company he was directed by Mr. Mak to the Telok Panglima address. In addition to that, one of the solicitors of the petitioners who accompanied him, called the petitioners in Singapore who confirmed the Telok Panglima address as the correct address of the respondent company. No doubt Mr. Mak had denied this but can conspiracy be founded on these facts?

One other fact that stands out and speaks volumes in respect of the applicants' conduct is the draft letter of termination. The provisional liquidator affirmed that he had telephoned his office to fax a draft letter of termination of the employees to the Telok Panglima address. The employees denied receiving the fax contending it did not come through their machine. However, in Enclosure 26 Tay Yew Keng had specifically annexed this draft letter and in para 31 he affirms thus:

> Annexed hereto is a copy of the letter marked "A 17" issued by the Provisional Liquidator to the person at the office of premises.' The Provisional Liquidator purported to terminate the service of all the employees of the applicant company, KKBI Sistem Sdn. Bhd. and Dreambed Sdn. Bhd. who occupy the premises.
>
> A 17 is reproduced herewith:
>
> Ng, Lee & Partners
> Public Accountants
>
> Our Ref KKBI/M-0l/ML
>
> 7th April 1995
>
> To All The People Present
> at Lot 1, Lorong 10B
> Telok Panglima Garang
> Banting 42500 Kuala Langat

Dear Sirs

High Court of Malaya at Kuala Lumpur Companies (Winding-up) No. D5-78-400 of 1993 KKBI Manufacturing Sdn. Bhd. in Liquidation (Formerly Known as King Koil Bedding Industries (M) Sdn. Bhd.)

l am appointed the Provisional Liquidator for the abovementioned company on 6th April 1995 before the Honourable Mr. Justice Dato' Haji Malek Bin Haji Ahmad, High Court of Malaya at Kuala Lumpur. I enclose a copy of the sealed Order for your information. In accordance with Rule 63 of the Companies (Winding-Up) Rules 1972, I am also an officer of the High Court and it is in this capacity that I am writing to you.

In accordance with Prayer 1(c), I now write to inform you that I am temporarily terminating all the employees of the company with immediate effect. This is to enable me to ascertain the financial position of the company. I shall contact you again when I have done so.

Yours truly,

For and on behalf of KKBI Manufacturing Sdn. Bhd. in Liquidation
Ng Pyak Yeow
Provisional Liquidator

It will be noted that the said letter is unsigned. I cannot by any stretch of the imagination subscribe to the suggestion that a provisional liquidator of such experience would have not signed the termination notice since it is alleged that it was issued to the person at the office. The clear inference is that it must have come off the fax and is now being used by the applicants for their own purpose. Further whilst the letter is addressed to all the people present at the Telok Panglima address it is specifically addressed to KKBI Manufacturing Sdn. Bhd. in liquidation (formerly known as King Koil Bedding Industries (M) Sdn. Bhd.).

Another interesting fact to note is that the respondent averred that he directed his office to fax the said letter to the respondent company's address which was at the Telok Panglima address. Since the letter arrived at that place it must therefore be that the respondent company's address must have been also at the Telok Panglima address and this has not been denied in any affidavit.

On the facts as they stand on the affidavits I cannot find any substance in the applicants' allegations.

In *QIW Retailers Ltd. v. Felview Pty. Ltd. & Anor.* [1989] 7 ACLC 510, 519 Macrossan J said this with regard to the torts of malicious prosecution and abuse of process in considering a case involving the winding-up of a company:

> The mental ingredients involved in the commission of both torts are to be assessed by considering the attitudes, beliefs and objectives of the second defendant.

Taking into consideration the facts of the present case, as averred by the applicants in the various affidavits, the attitudes, beliefs and objectives of the petitioners and the provisional liquidator were nothing more than to execute the due process of the law.

Macrossan J further continued also at p. 519:

> In malicious prosecution, a plaintiff has to prove that proceedings have been maliciously instituted, or continued against him and that they have terminated in his favour. He is obliged to show, as well, that the proceedings were so broad or continued without reasonable and probable cause and that some special injury or damage has been sustained by him in consequence. In the tort of malicious prosecution, want of reasonable and probable cause is an additional ingredient for which proof is required in addition to malice: *Glinski v. McIver* [1962] AC 726, 744.

Macrossan J describes the concept of reasonable and probable cause as follows at p. 520:

> The concept involves a belief based upon reasonable grounds of the existence or a state of circumstances which, if true, would reasonably lead an ordinary prudent man, placed in that situation, to the conclusion that the proceedings would probably succeed. The belief referred to may not always need to be inquired into but the facts as they were known to the one who instituted the relevant proceedings do need to be established and scrutinised: per Denning LJ in *Tempest v. Snowden* [1952] 1 KB 130, 138, 139.

In any event it is my finding that on the facts herein, absence of reasonable and probable cause has not been shown by the applicants. On this basis alone I hold that the applicants have failed to show a case for malicious prosecution. I arrive at this conclusion because throughout the alleged trespass and/or act of malicious prosecution the provisional liquidator had proceeded on the guidance and advice of solicitors including the petitioners' solicitors from Singapore.

(2) *Section 14 of the Courts of Judicature Act 1964*

The provisional liquidator relied on s. 14 of the Courts of Judicature Act 1964.

Section 14 reads as follows:

> 14. Protection of Judges and other judicial officers
>
> (1) No Judge or other person acting judicially shall be liable to be sued in any civil Court for any act done or ordered to be done by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, nor shall any order for costs be made against him, provided

a that he at the time in good faith believed himself to have jurisdiction to do or order the act complained of.

(2) No officer of any Court or other person bound to execute the lawful warrants or orders of any Judge or other person acting judicially shall be liable to be sued in any civil Court for the execution of any warrant or b order which he would be bound to execute if within the jurisdiction of the person issuing the same.

(3) No sheriff, bailiff or other officer of the Court charged with the duty of executing any judgment, order or warrant of distress, or of attaching any property before judgment, shall be liable to be sued in any civil Court in c respect of any property seized by him, or in respect of damage caused to any property in effecting or attempting to effect the seizure, unless it shall appear that he knowingly acted in excess of the authority conferred upon him by the writ, warrant or order in question, and he shall not be deemed to have acted knowingly in excess of his authority merely by reason of knowing of the existence of a dispute as to the ownership of the property d so seized.

Mr. Murthi argues that based on s. 14(1) even a judicial officer performing a judicial act will be liable if there is want of good faith in believing he had jurisdiction to do, or in doing the act complained of. Section 14(2) relates to e the execution of the orders made by a Court. In other words in the execution of ministerial duties. However in so far as this present application is concerned Mr. Murthi concedes that the relevant provision would be s. 14(3). It is the applicants' contention that the protection afforded by this sub-section is limited to the actual enforcement, provided it is not in excess of the authority conferred upon him. They also contend that this sub-section does not afford protection f relating to antecedent acts, i.e. if there is conspiracy and/or abuse of legal process occurring before the order is enforced. It is further contended that this sub-section affords no protection to acts done outside the scope of the order, e.g. where a third party's right is affected and in which case it is argued that the ability of the sheriff, bailiff or other officer of the Court arises g independently.

Officers of the Courts act either judicially or ministerially. A judicial act is one wherein upon the occurrence of a dispute the matter is heard and adjudicated upon with or without the exercise of discretion. A ministerial act is one which is required by law to be performed and the doer has no h discretion in the matter but do it.

In the present case, the applicants contend that there is an abuse of Court process and seek refuge upon the Court of Appeal decision in *Speed Seal Products Ltd. v. Paddington* [1986] 1 All ER 91 which held that the tort of i abuse of the process of the Court would lie against a plaintiff when it could be shown that he had set proceedings on foot to effect an object or purpose which was not within the scope of the process.

In fact the case that founded this tort of abuse of the process of the Court was *Grainger v. Hill* [1838] 4 Bing NC 212, 132 ER 769. In that case the plaintiff had borrowed £80 from the defendants on the mortgage of a ship which he owned. The debt was repayable on 28 September 1837. The defendants, being apparently apprehensive as to their security, decided in November 1836 (i.e. before the debt was repayable) to possess themselves of the ship's register, without which the plaintiff could not go to sea. They therefore called on the plaintiff to pay the debt (which was not due) and threatened to arrest him if he failed to pay. The defendants then made an affidavit of debt and sued out a writ of *capias* indorsed for bail in the sum of some £95, and sent in two sheriff's officers with the writ to the plaintiff, who was ill in bed and attended by a surgeon. One of the officers then told the plaintiff that they had not come to take him but to get the ship's register, but that if he failed to deliver the register either they must take him or leave one of the officers with him. The plaintiff, being unable to procure bail and being alarmed, gave up the register. The plaintiff claimed damages for the loss of voyages which he could not undertake because of the loss of the register, and also the recovery of the register.

The plaintiff succeeded at the trial, and there was an appeal to the Exchequer Chamber, which dismissed it. Tindal CJ said (4 Bing NC 212 at 221, 132 ER 769 at 773):

> The second ground urged for a non suit is that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this, and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and, probable cause for the defendants' proceeding, is the same: that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for malicious arrest or malicious prosecution, in order to support which action the termination of the previous proceeding must be proved ...

In *Goldsmith v. Sperrings Ltd.* [1977] 2 All ER 566 at 574 Lord Denning MR in a dissenting judgment said:

> What may make it (the legal process) wrongful is the purpose for which it is used. If it is done in order to exert pressure so as to achieve an end which is improper in itself then it is a wrong known to the law.

Where a legal process, the basis for which in itself could have proper foundation, has been perverted to satisfy some other motive such as extortion or oppression an action will lie at the feet of a party that suffers the wrong. This is the tort of abuse of process. Unlike the tort of malicious prosecution the tort of abuse of process does not depend on the wrongful procurement of the legal process but in the misuse of the process however correctly it was obtained. It is, as succinctly described by Isaacs J in *Varaira v. Howard Smith* [1911] 13 CLR 35, 91:

a A stalking-horse to coerce the defendant in some way entirely outside the ambit of the legal claim upon which the Court is asked to adjudicate.

It is to be observed from *Grainger's* case that gave origin to this tort that there must be an act, or a threat that accompanied the legal process and which act or threat was committed for the purpose of furthering the misuse. Every b advantage that a litigant intends to take against his opponent after launching an action cannot be labelled as an abuse of process merely because the Court has no authority or power or jurisdiction to grant the order sought. It takes on the mantle of sinisterness when the ulterior motive is to take a distinctive advantage over one's opponent upon a matter unrelated to the legal process c commenced.

In order to come within the *Grainger* principle the abuse of process must be used mainly for a purpose outside the scope of the legal process or an action which the Court is asked to adjudicate upon. Thus in *Metall und Rohstoff AG v. Donaldson Lujkin & Jenrette Inc & Another* [1988] 3 WLR 548 d damages for the tort of abuse of process of the Court was refused where a defendant sought dishonestly to defend an action and gave dishonest evidence in order to defeat a just claim.

Coming to the case at hand it is the contention of the applicants as pleaded e in their draft statement of claim that the provisional liquidator wanted to paralyse the four applicants' business and to apply pressure on the directors of the said company to settle the unjust demands of the petitioners.

To my mind whilst I hold that the tort of abuse of process is available to any one so aggrieved, the applicants have not satisfied me that on the evidence f disclosed in the affidavits and narrated by me in *extensio*, that the facts narrated bear out a case for abuse of process against the provisional liquidator.

Therefore there would be no abuse involved if a plaintiff genuinely seeks to achieve what he is entitled to by way of a suit and thus files the suit for the g purpose of achieving that objective.

Mr. Murthi referred me to r. 65(i)(2), and r. 66 of the said Rules. He in particular referred to Form 33 and argued that the provisional liquidator ought to have served this Form 33 Notice on the parties and ought not to have acted in the manner he did. The pith and substance of this argument falls deflated h when we refer to s. 244(l) of the Act which requires a list of contributories to be settled as soon as may be after making a winding up order by the Court. Here the provisional liquidator was appointed prior to the making of a winding up order.

i (3) *Section 229 of the said Act*

It was the contention of the provisional liquidator that instead of bringing this action against him the applicants ought to have proceeded under s. 229(1) of

the Act and r. 277(2) of the Rules. However the applicants pointed out that pursuant to r. 277(2) the parties who can complain against the liquidator are the creditor, contributory or the Official Receiver and since they belong to none of these three groups they fall outside the ambit of r. 277(2).

The provisional liquidator relied on *Re Timberland Ltd. (in liq) and Equitable Forestry Services Pty Ltd. (in liq)* 4 ACLR 259 and argued that the applicants ought to seek their remedy under the Act. By s. 278 of the Australian Companies Act 1961 the 3 parties who can complain to the Court are the creditor, the contributory and the Court itself. Therefore even a third party like the applicants herein can seek to complain to the Court for it to take cognisance of the matter. Whereas our r. 277(1) has substituted the Court with the Official Receiver.

I agree with Mr. Murthi that since the applicants herein are third parties affected by the conduct of the provisional liquidator they do not fall within the ambit of s. 229(1) of the Act or r. 277(2) of the Rules.

The applicants *relied on James Smith& Sons (Norwood) Limited v. Goodman* [1936] 1 Ch 216, 222 and argued that they do have a cause of action against the provisional liquidator.

In James Smith & Sons, the lessors of certain premises brought an action against the liquidator for a declaration that, in distributing the assets without making provision for the liabilities of the company under the two leases, the liquidator had acted wrongfully and negligently and in breach of his duty as a liquidator, and sought damages.

It was thus argued before me that similarly the applicants herein have a cause of action against the provisional liquidator.

The applicants also referred me to *Lonrho Plc v. Fayed and Ors.* [1991] 3 All ER 303 to support their argument that even using a lawful process a party can be guilty of the tort of conspiracy if the predominant motive was to cause injury.

The applicants contend that "unfair means" have been resorted to by the provisional liquidator to enforce the execution in this case. *Halsbury's Laws of England* 4th Edition Volume 17 Para 457 gives an example of unfair means such as the procuring of a search warrant to enable the bailiff to enter into the premises of the execution debtor.

It was the contention of the applicants that the provisional liquidator took instructions from the petitioners and to a question by the Court, Mr. Murthi conceded that he had no direct evidence to hold that submission. However, it was submitted that the provisional liquidator suppressed evidence from the Court when he obtained the *ex parte* order on 10 April 1995 in that it was said

that the provisional liquidator did not affirm in the said affidavit that he was told by the applicants' representative that he had come to the wrong premises.

To my mind the omission to state this did not amount to suppressing evidence. The provisional liquidator had sufficient material before him to justify his proceeding to the Telok Panglima address. In respect of this issue raised I can do no better than refer to *Lim Hean Pin v. Thian Seng Co. Sdn. Bhd. & Ors.* [1992] 2 MLJ 10, 28 wherein Edgar Joseph Jr J (as His Lordship then was) had this to say on the issue of non disclosure of material fact:

> In these circumstances, I accept that the non-disclosure related to a material fact but I do not consider that it was so severe that had it been disclosed I would have declined to intervene by way of *ex parte* interlocutory injunctive relief.

Finally the applicants submitted that since there were two sets of facts, namely one by the applicants contending wrongful attachment of their premises and supported by relevant exhibits and another by the respondent alleging that the Telok Panglima address was that of the respondent company, then in such circumstances it is not the duty of the Court to adjudicate on the conflicting evidence but to see if the claim deserved a fuller investigation and reference was made to *Winch v. Jones & Anor.* [1985] 3 All ER 97, 99, 101, 102 in support of the above proposition.

The Need for Leave from this Court before issuance of Writ

The then Supreme Court held in *Zainal Abidin Putih Anor. v. Che Wan Development Sdn. Bhd.* [1992] 2 MLJ 233, 241 that as the appellants were appointed receivers by the High Court and as they were officers of the Court, leave of the Court should have been obtained to proceed against them.

Since this is also a case where the applicants intend to file proceedings in tort against the Court appointed provisional liquidator, for damages, leave is therefore being sought.

In *Furber v. Kratter, The Times* 21 July 1988 it was held that a difficult point of law ought not to be determined as a preliminary point on an application for leave. If the point is arguable, leave should be given so that the plaintiff can put his case at trial.

The provisional liquidator contended that if the applicants were of the view they had a case against him they ought to file directly against him and that there was no need for leave. Mr. Tan sought to distinguish *Zainal Abidin Putih* by arguing that in *Zainal Abidin Putih* the receiver was continuously still holding office whereas in the present case the provisional liquidator held office only for seven days and when the company was wound up by consent, the Official Receiver took over. Mr. Tan argued that since the provisional liquidator had already vacated his office there was therefore no need for leave.

This is a fallacious argument. The mischief complained of by the applicants was done whilst the provisional liquidator was in office. Since it has been established that in such circumstances he was then for all purposes, an officer of the Court, I therefore hold that the principle laid down in the *Zainal Abidin Putih* case must apply and leave must be obtained.

I am further bound to follow the recent decision of the Court of Appeal in *Chi Liung Holdings Sdn. Bhd. v. Ng Pyak Yeow* [1995] 3 MLJ 204 wherein Abu Mansor JCA held that since a liquidator is appointed by the Court and is therefore considered an officer of the Court, leave of Court is necessary before an action can be commenced against him.

The provisional liquidator argues that since this application is made under the Act whatever action or remedy that the applicants seek must come within the ambit of the Act.

Intitulement

I refer to the intitulement of this action as set out at the commencement of this judgment as filed by the applicants.

It can be seen therefore that the application is based on ss. 218 and 143 of the Companies Act. Section 218 relates to winding up of a company and 143 deals with annual general meetings. In this case the provisional liquidator was appointed under s. 231 of the Act (before the winding up order was made) for the specific purpose of ensuring that there would be no dissipation of the assets. See *Omarjee v. Lincoln Hunt Australia Pty Ltd.* [1986] 4 ACLR 205. Section 233(1) of the Act provides that the provisional liquidator shall take into his custody or under his control all the properties and things in action to which the company is or appears to be entitled.

I am therefore satisfied that there was no lack of authority in the appointment of the provisional liquidator and that he had the powers to act pursuant to s. 233(1) of the said Act.

I am of the view that the applicants having taken out a summons in chambers under the same case number dealing with the Companies (Winding-Up) action and specifically raising in the intitulement that they would rely on the provisions of the sections of the Act which the applicants felt were relevant for their purpose, are bound by their own course of action. Fair warning has been given to the provisional liquidator that the applicants will confine themselves to the Act and therefore they must find their remedies within the strict walls of the Act.

Notwithstanding the applicants' submission that their claim is not under the Act but under the common law and notwithstanding the fact that the proposed statement of claim shows an intended action in tort, yet leave is being sought under the Act.

The only local case on the issue of intitulement is *Cheow Chew Khoon @ Teoh Chew Khoon (yang berniaga sebagai Cathay Hotel) v. Abdul Johari b. Abdul Rahman* [1995] 1 AMR 759, 795 wherein His Lordship Gopal Sri Ram JCA had this to say:

> The plaintiff, as noted earlier, says that if one were to undertake a careful scrutiny of the originating summons and the affidavit in support one would come to the conclusion that it is not an application made under O. 89. The summons does not, as I observed very early in this judgment, state any particular Rule of Court in its intitulement. Now, I think that is not only wrong but plainly embarrassing. How, might one ask, is a defendant or the Court to determine which Rule of Court the plaintiff is invoking unless he explicitly specifies it? If a defendant and the Court should have to conduct a close examination of the supporting affidavit in each case in order to determine the particular jurisdiction or power that is being invoked by an originating summons or other originating process that requires an intitulement, then a plaintiff will be at liberty to shift from one rule to another or indeed from one statute to another as it pleases him without any warning whatsoever to his opponent or the Court. It would make a mockery of the principle that there must be no surprise in civil litigation. If the submission of Counsel be the law, then it is wrong. But I am firmly of the view that it is not.
>
> In my judgment, this matter, which is a point of practice and procedure, is to be resolved by reference to the fundamental principle that a party must not take his opponent or the Court by surprise. It is my opinion that an originating process requiring an intitulement must state, with sufficient particularity, either in its heading or in its body, the statute or Rule of Court under which the Court is being moved: otherwise it would be an embarrassing pleading and may be liable to be struck out, unless sooner amended.

It is an elementary rule of civil litigation that a party ought not to take his opponent by surprise. Having elected to proceed to obtain leave pursuant to the Companies Act the applicants submit before me that their statement of claim clearly shows that they are relying on common law to found a claim in tort.

This is what His Lordship Gopal Sri Ram JCA meant when he said that neither the Court nor the defendant ought to be put in a position to go through and closely examine the affidavits or pleadings, to ascertain the particular jurisdiction or power that is being invoked.

I hold that the applicants ought to have applied by way of originating summons and since the claim is founded in tort, the intitulement ought to have been as follows:

> In the matter of O. 5 r. 2(a) of the Rules of the High Court 1980
>
> and
>
> in the matter of ss. 231 and 233 and s. 236(3) of the Companies Act 1965.

By adopting the above course of conduct the applicants would be indicating that they would be relying on the specific Rule of the High Court as directed by Gopal Sri Ram JCA and O. 5 r. 2(a) of the Rules of the High Court 1980 clearly provides for the mode of commencement of an action in tort.

Reference to ss. 231 and 233 of the Act will indicate that the applicants intend to launch an attack as against the provisional liquidator and as against the exercise of his powers.

Mr. Murthi cited the case of *Chi Liung & Son Sdn. Bhd. v. Chong Fah & Sons Sdn. Bhd. & Anor.* [1974] 2 MLJ 211 to suggest that he could file a summons in chambers under the same intitulement as for the winding up.

In the *Chi Liung* case Ajaib Singh J held that where there is an action pending before the Court an application to extend an existing caveat may quite properly be made by way of summons in chambers in the pending action where the lands in question are the very subject matter of the pending action and where the claims in the action include claims of such a nature as would involve a consideration of the preservation or security of the lands until the rights of the parties concerned are finally determined by the Court. The facts of the case are distinctly of such nature as to require the filing of the summons under the same intitulement. The entire basis for the subsequent application is dependant on the pending initial action. There is no way that the two actions are independent of one another.

In the present case I hold that it is wrong for the applicants to seek leave under the suit already field which relates to company matters. The application for leave in respect of issuing writ under common law for damages ought to have been by way of originating summons. On this ground too this application must fail.

It is pertinent to note that the provisional liquidator had everred that he had not proceeded beyond the reception area. To a question by the Court, Mr Murthi confirmed that his client had not denied that part of the affidavit. However, it was his contention that a mere act of trespass was sufficient for the applicants to apply for leave to sue.

I hold that the conduct of provisional liquidator in the exercise of his duites was, on the evidence so far tendered, irreproachable. I am well aware and indeed I have considered the fact that I ought not to determine as to whether the applicants have a case. However I am duty bound to evaluate the evidence presented by the applicants to see if such evidence is supportive of this application. I am considered judgment, it is not.

Section 232 (2) of the Act provides for the remuneration or salary of a liquidator by way or percentage or otherwise and if there is no agreement regarding his fees, he has to apply to Court to determine the mode of his remuneration.

His task is an onerous one. He is charged with a number of statutory duties and he has right to apply to Court for directions and guidance. He is an officer of the Court. He is open to accusations of impropriety, unfairness, and any label that a disgruntled party might seek to level at him. He ought to be protected against such abuse unless there is sufficient *prima facie* evidence to support such allegations. If any dissatisfied litigant is allowed to merely raise some issue and insist that on such mere allegations he be given leave to bring an action againts a liquidator, then the wheels of justice, which at the moment grind extremely slowly, will in such circumtances come to a halt. No one will venture towards this task. A liquidator will spend all his time defending every action filed againts him. He will then have to have professional indemnity insurance cover to protect himself against multifarious actions. Cost will escalate and his fees will have to be fixed.

I declined to adopt the principle enunciated in *Furber v. Kratter.* I do not subscribe to the view that merely bacause a point is arguable leave should be given. I hold that a strong *prima facie* case on the facts must be established before leave be given to sue a liquidator.

Having reviewed the facts relating to this case and the law relating to this application I find that the applicants have failed to satisfy me that there is sufficient evidence to warrant granting leave to file an action for the tort of conspiracy, abuse of legal process, malicious prosecution and trespass. In any event even on the issue of intitulement the applicants have failed. I therefore dismiss this application with costs.

Reported by Akbardin Hj Abd. Kadir